AUTHOR'S NOTE

This book is the result of the legal research programs conceived by the International Academy of Comparative Law on the occasion of preparing for its quadrennial International Congress of Comparative Law.

For the congresses, every four years, the board of the academy selects nearly fifty important and current law topics or subjects to be studied comparatively. The board requests that the academic community of each country write national reports on each subject, and it assigns the task of producing a comparative law study to a general reporter, who stresses the most important current global trends of the particular subject.

In this case, and for the purpose of the eighteenth International Congress of Comparative Law held in Washington, D.C., in July 2010, organized by the International Academy of Comparative Law with the support of the American Association of Comparative Law, the academy chose within the topic of constitutional law the subject of *Constitutional Courts as Positive Legislators* as one of the current subjects in constitutional law. The academy assigned me the task of preparing the general report on this subject for the congress, and this book is the result of the two years of research and work that I devoted to it. Following the general guidelines that I sent out, the national reporters wrote their national reports, which were the main source of information I had for writing the general report, which of course was complemented by my own research. I received thirty-six national reports from thirty-one countries: nineteen from Europe, including six from Eastern Europe; ten from the American continent (three from North America, five from South America, and two from Central America); one from Asia, and one from Australia. I thank all the national reporters for their cooperation in providing me with precious and current information on the subject.

The general report and the national reports were discussed at the congress. This book integrates those reports in the following parts: Part 1 includes my general report; Part 2 includes the national reports I received on the subject, in English and French, which are the official languages of the academy; and Part 3 includes the synthesis report I prepared for my oral presentation at the

eighteenth congress, at the George Washington Law School, in Washington, D.C., on July 27, 2010.

This was not the first time I have had the privilege of being a general reporter for the International Academy's congresses. I was first appointed general reporter by the academy forty-five years ago, on the subject of *Le régime des activités industrielles et commerciales des pouvoirs publiques*, for the seventh International Congress of Comparative Law, held in Uppsala, Sweden, in August 1966. On that occasion, Professor Robert Goldschmidt proposed my name for that task. He was a very well-recognized commercial law professor, who at the time was head of the Private Law Institute of the Central University of Venezuela and head of the Comparative Law Center of the Ministry of Justice. On that occasion he had been appointed general reporter on the subject by the academy, but because it was a public law subject (not a commercial law one), he asked me to allow him to propose my name to the academy, instead of his own, to write the general report. It was thanks to Robert Goldschmidt that I got in touch with the academy, at a time when I was a very young professor, with some books and articles already published but not at all known in the comparative law world. In any case, the appointment from the academy allowed me not only to write an extensive general report on public enterprise in comparative law[1] but also to begin close relations with the academy and all the very distinguished comparatist lawyers with whom I developed close friendships and long-standing academic relations. This was the time of professors Gabriel Marty, C.J. Hamson, John Hazard, Anthony Jolowicz, and Roland Drago, among others, who privileged me with their friendship. The Uppsala general report was published as the book *Les enterprises publiques en droit comparé* by the Faculté international pour l'ensignement du droit comparé, Paris 1968, with a foreword by Professor Roland Drago, who was later secretary-general of the academy.

In subsequent congresses, I was also appointed general reporter for different subjects: *Les limites a la liberté d'information (presse, radio, cinema et télévisión)*, at the eighth International Congress of Comparative Law, in Pescara, Italy, August–September 1970;[2] *Regionalization in*

[1] See Allan R. Brewer-Carías, "Le régime des activités industrielles et commerciales des pouvoirs publics en droit comparé," in *Rapports Généraux au VII^e Congrès International de Droit Comparé*, *Acta Instituti Upsaliensis Jurisprudentiae Comparativae*, Stockholm 1966, pp. 484–565.

[2] See Allan R. Brewer-Carías, "Las limitaciones a la libertad de información en el derecho comparado (prensa, radio, cine y televisión)," *Revista Orbita*, nos. 5–6, Caracas 1973, pp. 55–88.

Economic Matters, at the ninth International Congress of Comparative Law, in Tehran, August–September 1974;[3] *La décentralization territoriale, autonomie territoriale et régionalization politique*, at the eleventh International Congress of Comparative Law, in Caracas, August–September 1982;[4] *Les limitations constitutionnelles et légales contre les impositions confiscatoires*, at the thirteenth International Congress of Comparative Law, in Montreal, August 1990;[5] and *Constitutional Implications of Regional Economic Integration*, at the fifteenth International Congress of Comparative Law, in Bristol, United Kingdom, July–August 1998.[6] All these general reports were published in my book *Études de droit public comparé* (published in 2000 by Bruylant in Brussels).

This book, with the general report for the eighteenth International Congress, as mentioned, also includes the national reports as a thematic book, which the academy has encouraged.

I was formally elected an associate member of the academy many years ago, and in 1982, on the occasion of the eleventh International Congress of Comparative Law held in Caracas, which I helped organize, I was elected titular member and vice president, a position that I held for almost thirty years. On the occasion of the 2010 congress in Washington, I decided to step down, giving way to other comparatists from Latin America to join the board.

This work, once more, as general reporter is a good occasion to thank again all the members of the board of the academy for all their support of my academic activities during the almost the half century that has passed since I first delivered a general report at the University of Uppsala. In particular, I express my thanks to Professor Roland Drago, for many decades the secretary-general of the academy, who through his persistent

[3] See Allan R. Brewer-Carías, "Regionalization in Economic Matters in Comparative Law," in *Rapports Generaux au IX Congrés International de Droit Comparé, Teherán 1974*, Brussels 1977, pp. 669–696.

[4] See Allan R. Brewer-Carías, "La descentralización territorial: Autonomía territorial y regionalización política," en *Revista de Estudios de la Vida Local*, nº 218, Instituto de Estudios de Administración Local, Madrid, April–June 1983, pp. 209–232.

[5] See Allan R. Brewer-Carías, "Les protections constitutionnelles et légales contre les impositions confiscatories," *Rapports Généraux XIIIe Congres International*, Académie Internationale de Droit Comparé, Montreal 1990, pp. 795–824.

[6] See Allan R. Brewer-Carías, *Las implicaciones constitucionales de la integración económica regional*, Cuadernos de la Cátedra Allan R. Brewer-Carías de Derecho Público, Universidad Católica del Táchira, Editorial Jurídica Venezolana, Caracas 1998.

work positioned the academy among the most recognized institutions in current comparative law.

Beatriz, my wife, went with me to the Uppsala congress in 1966, and she has accompanied me during the past decades in all my academic ventures and relations with the academy. She has been the permanent witness to the hours, days, weeks, and years that the academic life requires; and in the particular case of the work published in this book, she has been even a closer witness in these years of exile in New York – a result of the authoritarian government in Venezuela that since 1999 has seized all branches of government, demolishing with absolute impunity democratic institutions and the rule of law.[7]

It was thanks to her fortitude, support, love, and understanding, that during the difficult months of 2011, I was able to finish this work on time. That is why I dedicate this book to her, with all my love.

New York, July 2011

[7] See Allan R. Brewer-Carías, *Dismantling Democrary. The Chávez Authoritarian Experiment*, Cambridge University Press, New York, 2010.

PART ONE

CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS IN COMPARATIVE LAW

INTRODUCTION

HANS KELSEN, JUDICIAL REVIEW, AND THE NEGATIVE LEGISLATOR

At the beginning of the twentiest century, Hans Kelsen, in his very well-known article "La garantie juridictionnelle de la constitution (La justice constitutionnelle)," published in 1928, in the *Revue du droit public et de la science politique en France et a l'étranger*, began to write for non-German-speaking readers about constitutional courts as "negative legislators."[1] As Kelsen was one of the most important constructors of modern public law of the twentieth century, it is indeed impossible to write about the opposite assertion – on constitutional courts as positive legislators – without referring to his thoughts on the matter.[2]

[1] See Hans Kelsen, "La garantie juridictionnelle de la constitution (La justice constitutionnelle)," *Revue du droit public et de la science politique en France et a l'ètranger*, Librairie Général de Droit et de Jurisprudence, Paris 1928, pp. 197–257. See also the Spanish text in Hans Kelsen, *La garantía jurisdiccional de la Constitución (La justicia constitucional)*, Universidad Nacional Autónoma de México, Mexico City 2001.

[2] As all the national reporters, in one way or another, have done in their national reports for subject IV.B.2 of the eighteenth International Congress of Comparative Law, Washington, D.C., July 2010. See the text of all national reports in Part 2 of this book.

In his article, while sharing his experience on the establishment and functioning of the Constitutional Court of Austria in 1920, conceived of as an important part of the concentrated system of judicial review that he had introduced for the first time in Europe,[3] Kelsen began to explain the role of such constitutional organs established outside of the judicial branch of government, but with jurisdictional powers to annul statutes they deemed unconstitutional.

The Austrian system, which was established the same year as that in Czechoslovakia,[4] according to Kelsen's own ideas,[5] sharply contrasted with, at that time, the already well-established and well-developed diffuse system of judicial review adopted in the United States, where for more than a century, courts and the Supreme Court had already developed a very active role as constitutional judges.[6]

It is true that the classic distinction of the judicial review systems in the contemporary world, between the concentrated systems of judicial review and the diffuse systems of judicial review,[7] has developed and has changed, and is difficult to apply in many cases clearly and sharply.[8] Consequently, in almost all democratic countries, a convergence of principles and solutions on

[3] See generally Charles Eisenmann, *La justice constitutionelle et la Haute Cour Constitutionelle d'Autriche* (reprint of the 1928 edition, with H. Kelsen's preface), Economica, Paris 1986; Konrad Lachmayer, *Austrian National Report*, p. 1.

[4] See Zdenek Kühn, *Czech National Report*, p. 1.

[5] Kelsen called constitutional justice his "most personal work." See Theo Öhlinger, "Hans Kelsen y el derecho constitucional federal austriaco: Una retrospectiva crítica," *Revista Iberoamericana de Derecho Procesal Constitucional*, nº 5, Instituto Iberoamericano de Derecho Procesal Constitucional, Editorial Porrúa, Mexico City 2006, p. 219.

[6] For the purpose of this general report, the expression "constitutional courts" refers generally to constitutional tribunals or courts – specifically established in many countries as constitutional jurisdictions, with powers to annul with *erga omnes* effects unconstitutional statutes, as well as to supreme courts or tribunals also acting as constitutional jurisdictions, or any court or tribunal when acting as constitutional judges.

[7] See generally Mauro Cappelletti, *Judicial Review in Contemporary World*, Bobbs-Merrill, Indianapolis 1971, p. 45; Mauro Cappelletti and J. C. Adams, "Judicial Review of Legislation: European Antecedents and Adaptations," *Harvard Law Review* 79, nº 6, April 1966, p. 1207; Mauro Cappelletti, "El control judicial de la constitucionalidad de las leyes en el derecho comparado," *Revista de la Facultad de Derecho de México* 61, 1966, p. 28; Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989; Allan R. Brewer-Carías, *Étutes de droit pubic comparé*, Bruylant, Brussels 2000, pp. 653 ff.

[8] See, e.g., Lucio Pegoraro, "Clasificaciones y modelos de justicia constitucional en la dinámica de los ordenamientos," *Revista Iberoamericana de Derecho Procesal Constitucional*, nº 2, Instituto Iberoamericano de Derecho Procesal Constitucional, Editorial Porrúa, Mexico City 2004, pp. 131 ff.; Alfonse Celotto, "La justicia constitucional en el mundo: Formas y modalidades," *Revista Iberoamericana de Derecho Procesal Constitucional*, nº 1, Instituto Iberoamericano de Derecho Procesal Constitucional, Editorial Porrúa, Mexico City 2004, pp. 3 ff.

matters of judicial review has progressively occurred,[9] to the point that nowadays it is possible to say that there are no means or solutions that apply exclusively in one or another system.[10] Nonetheless, this fact, in my opinion, does not deprive the distinction of its basic sense.

In effect, and in spite of criticisms of the concentrated-diffuse distinction,[11] the distinction remains very useful, particularly for comparative law analysis, and it is not possible to consider it obsolete.[12] The basis of the distinction, which can always be considered valid, is established between, on the one hand, constitutional systems in which all courts are constitutional judges and have the power to review the constitutionality of legislation in decisions on particular cases and controversies, without such power necessarily being expressly established in the Constitution, and on the other hand, constitutional systems in which a constitutional jurisdiction is established assigning its exercise to a constitutional court, tribunal or council or to the supreme or high court or tribunal of the country, as the only court with

[9] See, e.g., Francisco Fernández Segado, *La justicia constitucional ante el siglo XXI. La progresiva convergencia de los sistemas americano y europeo-kelseniano*, Librería Bonomo Editrice, Bologna 2003, pp. 40 ff.

[10] On the effort to establish a new basis for new distinctions, see Louis Favoreu, *Les cours constitutionnelles*, Presses Universitaires de France, 1986; Michel Fromont, *La justice constitutionnelle dans le monde*, Dalloz, Paris 1996; D. Rousseau, *La justice constitutionnelle en Europe*, Montchrestien, Paris 1998.

[11] See Francisco Fernández Segado, "La obsolecencia de la bipolaridad 'modelo Americano-modelo europeo-kelseniano' como criterio analítico del control de constitucionalidad y la búsqueda de una nueva tipología explicativa," in *La justicia constitucional: Una visión de derecho comparado*, Ed. Dykinson, Madrid 2009, vol. 1, pp. 129–220; Guillaume Tusseau, *Contre les "modèles" de justice constitutionnelle: Essai de critique métodologique*, Bononia University Press, Universitá di Bologna, Bologna 2009 (bilingual French-Italian edition); Guillaume Tusseau, "Regard critique sur les outils méthodologique du comparatisme. L'example des modèles de justice constitutionnelle," *IUSTEL: Revista General de Derecho Público Comparado*, nº 4, Madrid, January 2009, pp. 1–34.

[12] In fact, what can be considered obsolete is the distinction that derives from an erroneous denomination that has been given to the two systems, particularly by many in Europe, contrasting the so-called American and European systems. This ignores that the "European system," which cannot be reduced to the existence of a specialized Constitutional Court, was present in Latin America a few decades before its introduction in the Czechoslovak Constitution and that the "American system" is not at all endemic to countries with common law systems, having been spread since the nineteenth century into countries with Roman law traditions. See Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989; Vicki C. Jackson and Mark Tushent, *Comparative Constitutional Law*, 2nd ed., Foundation Press/Thomson West, New York 2006, pp. 465 ff., 485 ff. Also, as has been pointed out by Francisco Rubio Llorente, it is impossible to talk about a European system, when within Europe there are more differences between the existing systems of judicial review than between any of them and the American system. See Francisco Rubio Llorente, "Tendencias actuales de la jurisdicción constitucional en Europa," in *Manuel Fraga: Homenaje académico*, Fundación Canovas del Castillo, Madrid 1997, vol. 2, p. 1416.

jurisdictional power to annul statutes contrary to the Constitution – such courts or the assignment of power to them must be expressly provided for in the Constitution. This is the basic ground for the distinction that still exists in comparative law, even in countries where both systems function in parallel, as it happens in many Latin American countries.[13] It is in this sense that this book refers to the concentrated system and the diffuse system of judicial review.[14]

In this sense, the concentrated system of judicial review, after being adopted since the nineteenth century in many Latin American countries, was adopted in Europe following Kelsen's ideas set forth in the 1920 constitutions of Czechoslovakia and Austria based on the principle of constitutional supremacy and its main guarantee, that is, the nullity and the annulability of statutes and other State acts with similar rank, when they are contrary to the Constitution. Given the general fear regarding the Judiciary and the prevailing principle of the sovereignty of parliaments, the system materialized through the creation of a special constitutional court established outside of the judicial branch of government with the power not only to declare the unconstitutionality of statutes that violate the Constitution but also to annul them with *erga omnes* effects, that is, to expel them from the legal order.

Kelsen's initial arguments were developed to confront the problems that such powers of judicial review in the hand of a new constitutional organ different from the Legislator could arise in Europe regarding the principle of separation of powers and, in particular, its incidence in legislative functions. But the fact was that the system, by that time and without the need to create a separate constitutional court, was already in existence, with similar substantive trends in some Latin American countries such as Colombia and

[13] As is, for instance, the case of Brazil, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, Peru, and Venezuela, as well as Portugal, and in a certain way Greece, and Canada. See Allan R. Brewer-Carías, "La jurisdicción constitucional en América Latina," in Domingo García Belaúnde and Francisco Fernández Segado (coords.), *La jurisdicción constitucional en Iberoamérica*, Dykinson S.L. (Madrid), Editorial Jurídica Venezolana (Caracas), Ediciones Jurídicas (Lima), Editorial Jurídica E. Esteva (Uruguay), Madrid 1997, pp. 117–161.

[14] See Allan R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America : A Comparative Study of Amparo Proceeding*, Cambridge University Press, New York 2009, pp. 81 ff.

Venezuela, where the annulment powers regarding unconstitutional statutes had been granted since 1858 to supreme courts of justice.[15]

On the other hand, at the time when the concentrated system of judicial review was formulated in Europe, it contrasted sharply with the diffuse or decentralized system of judicial review that had developed in the United States since the 1808 Supreme Court case *Marbury v. Madison*, 1 Cranch 137 (1803), which beginning in the nineteenth century also spread to many Latin American countries, including Argentina, Brazil, Colombia, and Venezuela,[16] and was adopted in some European countries, including Norway,[17] Denmark, Sweden, and Greece.[18]

Summarizing, when Kelsen formulated his arguments in support of the concentrated system of judicial review in Europe, the same system had already existed for more than six decades in Latin America, and the diffuse system had existed for almost a century in North America and later also in Latin America and in some European countries.

But the fact is that it was through Kelsen's proposals and writings that judicial review developed in Europe, eventually contributing to end the principle of parliamentary sovereignty. Kelsen himself not only drafted the proposal to incorporate the new Constitutional Court in the 1920 Austrian Constitution but also was a distinguished member of that tribunal for many years, where he acted as its judge rapporteur. He was then key in implementing the concentrated system of judicial review that over the following decades, and particularly after World War II, developed throughout Europe. Even in France, with its traditional and initial a priori concentrated system of judicial review, the result of the jurisprudence of the Constitutional Council has been considered the "symbolic end of the sovereignty of the law," given the current consideration of the law as "the expression of the general will *within the respect of the Constitution.*"[19]

[15] On the origins of the Colombian and Venezuelan systems, see Allan R. Brewer-Carías, *El sistema mixto o integral de control de la constitucionalidad en Colombia y Venezuela*, Universidad Externado de Colombia, Pontificia Universidad Javeriana, Bogotá 1995. See Sandra Morelli, *Colombian National Report II*, p. 2.

[16] See Allan R. Brewer-Carías, "La jurisdicción constitucional en América Latina," in Domingo García Belaúnde-Francisco Fernández Segado (coords.), *La jurisdicción constitucional en Iberoamérica*, Dykinson S.L. (Madrid), Editorial Jurídica Venezolana (Caracas), Ediciones Jurídicas (Lima), Editorial Jurídica E. Esteva (Uruguay), Madrid 1997, pp. 117–161.

[17] See Eivind Amith, *Norway National Report*, p. 1.

[18] See Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, *Greek National Report*, pp. 2–3.

[19] See Bertrand Mathieu, *French National Report*, p. 5.

The basic thoughts of Kelsen on the matter, as already mentioned, directed at non-German-speaking readers, were expressed in his 1928 article "The Jurisdictional Guarantee of the Constitution (Constitutional Justice),"[20] in which he considered the general problem of the legitimacy of the concentrated system of judicial review. In particular, he analyzed the compatibility of the system with the principle of separation of powers, based on the fact that an organ of the State other than the Legislator could annul statutes without the decision to do so being considered an invasion of the Legislator's domain.

In this regard, after arguing that "to annul a statute[] is to establish a general norm, because the annulment of a statute has the same general character of its adoption," and after considering that to annul a statute is "the same as to adopt it but with a negative sign, and consequently in itself, a legislative function," Kelsen considered that the court that has the power to annul statutes is, consequently, "an organ of the Legislative branch."[21] Nonetheless, Kelsen finished by affirming that, although the "activity of the constitutional jurisdiction" is an "activity of the Negative Legislator," this does not mean that the constitutional court exercises a "legislative function," because that would be characterized by the "free creation" of norms. The free creation of norms, however, does not exist in the case of the annulment of statutes, which is a "jurisdictional function" that can only be "essentially accomplished in application of the norms of the Constitution," that is, "absolutely determined in the Constitution."[22] His conclusion was that the constitutional jurisdiction accomplishes a "purely juridical mission, that of interpreting the Constitution," with the power to annul unconstitutional statutes the principal guarantee of the supremacy of the Constitution.[23]

[20] See Hans Kelsen, "La garantie juridictionnelle de la constitution (La justice constitutionnelle)," *Revue du droit public et de la science politique en France et a l'ètranger*, Librairie Général de Droit et de Jurisprudence, Paris 1928, pp. 197–257. See also Hans Kelsen, "Judicial Review of Legislation : A Comparative Study of the Austrian and the American Constitutions," *Journal of Politics* 4, nº 2, Southern Political Science Association, May 1942, pp 183-200; "El control de la constitucionalidad de las leyes: Estudio comparado de las Constituciones Austríacas y Norteamericana," *Revista Iberoamericana de Derecho Procesal Constitucional*, No 12, Editorial Porrúa, Mexico 2009, pp. 3-17; "Le contrôle de constitutionnalité des lois. Une étude comparative des Constitutions autrichienne et américaine," *Revue française de droit constitutionnel*, nº 1, Presses Universitaires de France, Paris 1999, pp. 17–30.

[21] See Hans Kelsen, *La garantía jurisdiccional de la Constitución (La justicia constitucional)*, Universidad Nacional Autónoma de México, Mexico City 2001, p. 54.

[22] *Id.*, pp. 56–57. See Allan R. Brewer-Carías, *Études de droit public comparé*, Bruylant, Brussels 2003, p. 682.

[23] See Hans Kelsen, *La garantía jurisdiccional de la Constitución (La justicia constitucional)*, Universidad Nacional Autónoma de México, Mexico City 2001, p. 57.